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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN RAYMOND KINLOCH,

Defendant and Appellant.

D068564

(Super. Ct. No. SCS261258)

APPEAL from a judgment of the Superior Court of San Diego County, Ana L. Espana, Judge. Affirmed.

Patrick Morgan Ford for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

John Raymond Kinloch was charged in a 36-count amended information with the commission of sexual offenses involving five minors referred to as John Doe (hereafter referred to as John Doe 1), John Doe 2, John Doe 3, John Doe 4, and John Doe 5.

Counts 1 through 18 alleged crimes committed against John Doe 1. Specifically, counts 1 through 16 charged Kinloch with committing lewd acts upon a child under Penal Code<sup>1</sup> section 288, subdivision (a) (§ 288(a)), and alleged that he committed an offense described in section 667.61, subdivision (c) against more than one victim within the meaning of section 667.61, subdivisions (b), (c), and (e); and that he did so by having the victim undress, hugging the victim when he was nude, rubbing the victim's legs and kissing him on the mouth. Count 18 charged Kinloch with the possession of child pornography (§ 311.11, subd. (a)).

Counts 19 through 30 charged Kinloch with the commission of lewd acts upon John Doe 2, a child under the age of 14 years, in violation of section 288(a); and alleged that he committed an offense described in section 667.61, subdivision (c) against more than one victim within the meaning of section 667.61, subdivisions (b), (c), and (e).

Counts 31 and 32 charged Kinloch with the commission of lewd acts upon John Doe 3, a child 14 or 15 years of age, in violation of section 288, subdivision (c)(1) (§ 288(c)(1)). Counts 33 and 34 charged him with the commission of lewd acts upon John Doe 4 in violation of section 288(c)(1). Last, counts 35 and 36 charged him with lewd conduct against John Doe 5, also in violation of section 288(c)(1).

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

A jury convicted Kinloch of all counts except for count 25, which involved John Doe 2, and counts 33 and 34, which involved John Doe 4. On July 24, 2015, the court sentenced him to an aggregate prison term of five years plus 120 years to life.

Kinloch appeals, contending (1) the evidence was insufficient to support his convictions of the charged sex offenses involving John Doe 2 and John Doe 5; (2) his conduct involving John Doe 2 and John Doe 5 should have been charged under the statutes involving child pornography possession (§ 311.11) and distributing harmful matter electronically (§ 288.2), rather than under the "more general" provisions of section 288; (3) the court prejudicially abused its discretion when it denied his motion for a mistrial after John Doe 3 improperly testified he (Kinloch) once told John Doe 3 he had been caught in a " 'porn ring' "; (4) the court prejudicially erred by allowing a crime investigator, pursuant to Evidence Code section 1108, "to describe hundreds of pornographic images he found on [Kinloch]'s computer while searching his house"; and (5) his sentence "constitutes cruel and/or unusual punishment that is prohibited by the California and United States Constitutions." We affirm the judgment.

## FACTUAL BACKGROUND

### *A. The People's Case*

#### *John Doe 1 (Counts 1-18)<sup>2</sup>*

John Doe 1 was 19 years of age when he testified in this case in May 2015.

Kinloch was John Doe 1's second grade teacher at Feaster-Charter School in Chula Vista.

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<sup>2</sup> In his opening statement defense counsel conceded that Kinloch was guilty of possessing child pornography as charged in count 18.

John Doe 1 testified that, at that time, he was being raised by his mother and without a father, and he saw Kinloch as a "father figure" and "a very cool person." He and Kinloch spent a significant amount of time together after school in Kinloch's classroom while John Doe 1's mother was at work. Later that year John Doe 1 began to spend time with Kinloch away from the school. When he was in the third grade, John Doe 1 continued to spend time with Kinloch after school in Kinloch's classroom even though Kinloch was no longer his teacher, and he also continued to spend time with Kinloch off the school grounds. When John Doe 1 spent time with Kinloch in the classroom after school, during and after the second grade, Kinloch almost always kept the classroom door closed.

John Doe 1 testified that, one day after school when he was seven years of age and he was with Kinloch in the classroom while he was still in the second grade, Kinloch asked him to take his clothes off and explained that friends who cared about each other took their clothes off. John Doe 1 felt uncomfortable and told Kinloch he did not want to take his clothes off. Kinloch, who was sitting on a student desk, appeared to become upset and told John Doe 1 that, by taking off his clothes, he would show how much he cared about Kinloch. John Doe 1 then took off all of his clothes except his underwear. Kinloch then told him to take off his underwear, and he reluctantly complied. Kinloch then hugged him with both arms, and their bodies touched. John Doe 1 remained naked and walked around the classroom for several minutes before Kinloch permitted him to dress. When John Doe 1 was about eight years old, Kinloch began kissing him on the lips either late in the school year when he was in the second grade or early in the third grade. John Doe 1 was in the classroom, alone with Kinloch after school, the first time

Kinloch kissed him on the lips. John Doe 1 testified that Kinloch thereafter kissed him on the lips "[p]retty much every day" for "[y]ears," sometimes in Kinloch's classroom after school and sometimes when they were getting into or out of Kinloch's car.

John Doe 1 also testified that when he was in the second or third grade, Kinloch asked to see his penis more than once after school when they were in Kinloch's classroom. Kinloch would not directly ask whether he could see John Doe 1's penis; he would first steer the conversation toward the issue of puberty and then, during the conversation, he would ask to see John Doe 1's penis. John Doe 1 would say "no," but he would comply when Kinloch began sighing and became upset. John Doe 1 would expose his penis by pulling his pants and underwear down part way. Kinloch would ask John Doe 1 to pull back the foreskin of his penis, and he would comply. John Doe 1 continued to spend time with Kinloch after school, and Kinloch continued to ask him to expose his penis, when John Doe 1 was in the fourth and fifth grades (when he was nine and 10 years old), but Kinloch did not see his penis as often when he was in the fifth grade.

John Doe 1 testified that he was permitted to go on trips alone with Kinloch. Among other places, they traveled to Los Angeles, Santa Barbara, New York, Las Vegas, and Arizona. They often stayed in hotels and Kinloch would rent rooms with a single bed they would share. During most of these trips, while they were in bed and John Doe 1 was trying to sleep, Kinloch would rub John Doe 1's legs in what John Doe 1 described as "[s]low, long rubs to the outside of [his] thigh [and his] inner thigh." Once, when John Doe 1 questioned the touching, Kinloch explained that it was a "loving feeling." John Doe 1 never told his mother about Kinloch's behavior because she and Kinloch were

friends. During a trip to Long Beach when John Doe 1 was nine or 10 years old and in the fourth grade, John Doe 1 spent the night and shared a single bed with Kinloch aboard the Queen Mary ship. They both drank tequila before they went to bed. The alcohol made John Doe 1 feel "a little woozy." Kinloch rubbed John Doe 1's legs and then his penis over his boxer shorts.

John Doe 1 started seeing Kinloch less often after his 13th birthday. He testified that, as he grew older, his perspectives about life changed and he no longer had a kissing relationship with Kinloch after he turned 13. The last time Kinloch asked John Doe 1 to expose his penis occurred when John Doe 1 was 12 turning 13 years of age and in the eighth grade, after Kinloch picked him up from a friend's house in Coronado. John Doe 1 testified that he had spent the day with Kinloch at the beach. After dark, Kinloch repeatedly asked to see John Doe 1's penis. When John Doe 1 refused, Kinloch became upset but John Doe 1 continued to refuse to expose his penis. Their communications with one another stopped after that. John Doe 1 testified that Kinloch later called his mother "on the verge of tears" and told her he saw John Doe 1 as a "son."

Law enforcement recovered numerous sexually explicit photographs of John Doe 1 from Kinloch's computer. At trial, John Doe 1 identified himself as the juvenile in a number of those photographs. He testified that Kinloch often had a camera during their trips and took pictures of him. He also testified that he never consented to Kinloch's photographing his penis and buttocks when they were together in hotel rooms.

*John Doe 2 (Counts 19-30)*

John Doe 2 was 15 years of age when he testified in this case. In 2012, when he was about 13 years of age, John Doe 2 came into contact with Kinloch on what is now MeetMe, Inc.'s, internet social networking site (MeetMe).<sup>3</sup> In texting conversations with John Doe 2, Kinloch represented himself to be a sexually provocative red-headed young woman named "Aimee." John Doe 2 never met Aimee in person or spoke with her by telephone.

John Doe 2 testified that he and Aimee (Kinloch) communicated by means of text messaging three or four days each week. Based on the pictures of Aimee that Aimee sent to him, John Doe 2 became sexually aroused and was willing, at Aimee's request, to send back sexually explicit pictures of himself. Aimee asked John Doe 2 to send nude pictures of himself, including pictures of his penis and of him masturbating. At Aimee's request, John Doe 2 also sent a video of himself masturbating and ejaculating. John Doe 2 testified that Aimee wrote to him that the pictures caused her to become sexually aroused, she found him to be "sexy and hot," and she would "lick the tip [of John Doe 2's penis] like a Tootsie Roll." All of the pictures were taken in John Doe 2's home in Coachella.

*John Doe 3 (Counts 31-32)*<sup>4</sup>

Born in October 1981, John Doe 3 was 33 years old when he testified in this case. In July 1996, when he was 14 years of age, John Doe 3 met Kinloch on a gay internet

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<sup>3</sup> In 2012, MeetMe's website was known as myyearbook.com.

<sup>4</sup> In his opening statement, defense counsel conceded that Kinloch was guilty of these lewd act counts.

chat site. The two went on a date and soon began a romantic relationship. John Doe 3 told Kinloch his true age. Kinloch was born in July 1971, and he was 25 years of age when they met in July 1996. John Doe 3 testified he did not know how old Kinloch was when they met, and he thought Kinloch was 17 or 18 years of age. They dated off and on until about 1998. During that time, they routinely engaged in acts of mutual masturbation and oral copulation. They engaged in oral sex soon after they began dating when John Doe 3 was still 14 years of age.

During a search of Kinloch's house, police found several letters and printed e-mails that discussed his relationship with John Doe 3 and the activities they engaged in with each other.

*John Doe 4 (Counts 33-34)*<sup>5</sup>

Born in June 1997, John Doe 4 was 17 years of age when he testified in this case. In 2012, when he was 15 years of age, John Doe 4 met someone who called himself "Jason Churchwell" on an internet chat site. Churchwell wrote that he was in high school. John Doe 4 never met Churchwell in person.

Churchwell sent photographs that supposedly depicted him. He also sent John Doe 4 some nude photos showing only his torso. He convinced John Doe 4 to send some nude photographs of himself, including pictures of his penis and of him ejaculating. When John Doe 4 attempted to send a text to a number Churchwell had given him, he got a "wrong number" response, and he never heard from Churchwell again.

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<sup>5</sup> The jury found Kinloch not guilty of the lewd act offenses charged in counts 33 and 34, which involved John Doe 4.

*John Doe 5 (Counts 35-36)*

Born in March 1997, John Doe 5 was 18 years of age when he testified in this case. In 2012, when he was about 15 years of age, John Doe 5 came into contact with Kinloch through the MeetMe website by means of his smartphone. Through photographs of a nude young female he sent to John Doe 5, Kinloch, who was born in July 1971, represented himself to be a sexually provocative teenage girl named "Aimee"; he did not disclose to John Doe 5 that he was a 41-year-old man. John Doe 5 testified that Aimee asked him to send her pictures of his face. Later, Aimee asked him to send her nude photographs of himself, and eventually he did so.

John Doe 5 testified that at first he initially did not want to send nude photographs of himself because he was "raised not to." However, Aimee was persistent. John Doe 5 further testified that when he told Aimee he was not ready to send such photographs to her, "she didn't care, if I trust her, prove it, she wants one." John Doe 5 found Aimee sexually attractive and sent her a photograph of himself fully nude with his penis erect.

John Doe 5 testified he terminated his online texting relationship with Aimee when he began to feel that something was "kind of false" about her. He never met Aimee in person.

Investigators found John Doe 5's full name and telephone number in the "Contacts" section of Kinloch's cell phone. They also found sexually explicit photographs of John Doe 5 on Kinloch's notebook computer.

### *Police Investigation*

When the social network provider MeetMe caught suspicious images passing through its site in 2012, it contacted the National Center for Missing and Exploited Children, which in turn contacted the Department of Homeland Security.

Special Agent William Thompson of the Department of Homeland Security testified that a host of law enforcement agencies work together to find and prosecute those who use the internet to sexually exploit children. After the report from the National Center for Missing and Exploited Children was received, Agent Thompson obtained an internet protocol address for the computer that had engaged in the suspicious activity on the MeetMe social network site. Following a subpoena to the cable company, Agent Thompson focused his investigation on Kinloch and his home in San Ysidro. Agent Thompson also learned through the MeetMe site that Kinloch had been actively chatting with 10- to 13-year-old boys.

In late November 2012, law enforcement officers executed a search warrant at Kinloch's home. When officers arrived, Kinloch was present, standing outside next to his car. The officers seized numerous electronic devices, including computers and smart phones, from Kinloch's home and car. Computer forensic analysis revealed child pornography on the seized devices. As he was being transported by officers, Kinloch spontaneously stated, "It's all my fault I'm in this position. I made the mistake. I'm the only one who can blame myself."

Agent Thompson testified that Kinloch's computers and electronic devices contained "hundreds of child pornographic images of pre- and postpubescent young

males and numerous child pornography videos depicting similar[ly] aged . . . male individuals." The images depicted "sexual activity involving a minor and/or a lewd kind of a lascivious focus on the minor's genitalia." Agent Thompson further testified that "[m]any of the images depicted selfie-type images of the boys, the boys holding a cell phone or other device, taking a picture of themselves . . . while standing nude in front of a mirror with their erect penis exposed. Also, many of the images depicted them touching themselves, meaning touching their penises, their genital areas." The videos "primarily showed masturbation by these boys."

Kinloch's computers also contained bookmarks to a pornography website featuring images and videos of a woman titled "Brianna." Investigator James Hoefer testified that this Brianna persona had been used as a front by the operator of Kinloch's computer in online chat and text exchanges with third parties.

In one exchange Kinloch, using the Brianna persona, encouraged a boy to send pictures of himself masturbating. Brianna communicated that she wished to "fuck" the boy.

Agent Thompson testified he located images of John Doe 1, John Doe 2, and John Doe 5 on Kinloch's computer devices. The search of Kinloch's home produced letters and e-mails between Kinloch and John Doe 3 detailing "activities they [had] engaged in with each other."

#### *B. Defense Case*

Reginald Depass knew Kinloch from Feaster Charter School where Depass worked as the director of finance and school operations. Depass had a master key and

would occasionally visit the classrooms. He knew John Doe 1 as a student at that school. Depass testified he had observed John Doe 1 in Kinloch's presence and never saw any suspicious behavior.

Dr. Yesenia Barnard knew Kinloch when she was the school psychologist at the Feaster Charter School. She also knew John Doe 1. She was part of a small group that visited New York City which included Kinloch and John Doe 1. They all shared a condo on the trip. Barnard testified she never noticed any suspicious behavior between Kinloch and John Doe 1.

Roel Mislan testified he worked with Kinloch at Feaster Charter School. He knew John Doe 1 as a member of a student club he supervised. He would visit the classrooms, usually after hours, as the school's IT person. He had seen John Doe 1 in Kinloch's classroom after school, but never observed any inappropriate or suspicious activity. He also worked on Kinloch's classroom computer and never found anything inappropriate.

Deody Elisan, a network administrator at Feaster Charter School, worked with Kinloch there. He knew John Doe 1 as one of the students who liked to "hang out" after school. He had observed John Doe 1 and Kinloch together many times and never saw anything suspicious. Elisan helped maintain Kinloch's classroom computers and never found any inappropriate material. Elisan took his family on an outing to Sacramento with Kinloch and John Doe 1. He viewed Kinloch as a "father figure" to the boy.

Jorge Partida, a custodian at Feaster Charter School, knew Kinloch when he was a teacher there. He would enter Kinloch's classroom after school hours as part of his duties and never saw Kinloch alone with a student.

## DISCUSSION

### I. SUFFICIENCY OF THE EVIDENCE (LEWD ACTS AGAINST JOHN DOE 2 AND JOHN DOE 5) AND CLAIM OF INSTRUCTIONAL ERROR

#### A. Sufficiency of the Evidence

The jury convicted Kinloch of committing 11 lewd acts against John Doe 2, a child under the age of 14 years, in violation of section 288(a) (counts 19-24, 26-30), and of committing two lewd acts against John Doe 5—a child under the age of 14 or 15 years—by a perpetrator who was at least 10 years older than the child, in violation of section 288(c)(1) (counts 35-36). As discussed more fully in the factual background, *ante*, the evidence showed Kinloch engaged in online texting conversations with John Doe 2 and John Doe 5 on the MeetMe social networking site. Representing himself to be a sexually provocative teenage girl, Kinloch asked them to send him nude and sexually explicit photographs of themselves. John Doe 2 sent him photographs and a video showing himself masturbating, and John Doe 5 sent photographs of himself nude.

Kinloch first contends his convictions of the foregoing 13 lewd act offenses against John Doe 2 and John Doe 5 must be reversed because "[t]here was no evidence establishing that [he] received 'immediate' or contemporaneous sexual arousal when he requested the photos, or when the boys photographed themselves," and thus "[a]ny subsequent arousal he may have received from viewing these photographs was not contemporaneous with the production of these images." Kinloch's contention is unavailing because no such evidence was required to sustain his convictions under section 288(a) or 288(c)(1).

"The prosecution has the burden of proving every element of a crime beyond a reasonable doubt." (*People v. Lopez* (2010) 185 Cal.App.4th 1220, 1228 (*Lopez*).) "To determine whether the prosecution has introduced sufficient evidence to meet this burden, courts apply the "substantial evidence" test.' " (*Id.* at pp. 1228, 1229.)

Section 288(a) provides that one is guilty of a felony in violation of that section when that person "willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child."<sup>6</sup>

Section 288(c)(1) provides that one is guilty of a violation of that section when that person "commits an act described in [section 288](a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child."<sup>7</sup>

Viewing the evidence in the light most favorable to the judgment, as we must (*People v. Johnson* (1980) 26 Cal.3d 557, 578), we conclude the prosecution met its

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<sup>6</sup> Section 288(a) provides in part: "[A]ny person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

<sup>7</sup> Section 288(c)(1) provides in part: "Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year."

burden of presenting substantial evidence from which a reasonable trier of fact could find beyond a reasonable doubt that Kinloch was guilty of the violations of sections 288(a) and 288(c)(1) charged in counts 19-24, 26-30, and 35-36.

"The purpose of section 288 is to protect children from being sexually exploited . . . ." (*Lopez, supra*, 185 Cal.App.4th at pp. 1231, 1232, citing *People v. Martinez* (1995) 11 Cal.4th 434, 443 (*Martinez*) ["section 288 was enacted to provide children with 'special protection' from sexual exploitation"].)

In *Martinez*, the California Supreme Court explained that, in light of this legislative purpose, "the courts have long indicated that section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act." (*Martinez, supra*, 11 Cal.4th at p. 444.) Thus, "*any* touching of an underage child is 'lewd or lascivious' within the meaning of section 288" (*id.* at p. 445) where it is "accomplished with the intent of arousing the sexual desires of either the perpetrator or the child (*id.* at p. 452)."

However, "a 'touching' under section 288 need not be committed directly by the defendant." (*Lopez, supra*, 185 Cal.App.4th at p. 1231.) In *Lopez*, the Court of Appeal explained that "a defendant who, without touching the child, compel[s] the child to remove her own clothing [is] guilty of violating section 288. Violation of section 288 requires the defendant to either touch the body of a child or willfully cause a child to touch her own body, the defendant's body, or the body of someone else." (*Id.* at p. 1229, citing *People v. Austin* (1980) 111 Cal.App.3d 110 (*Austin*).) Thus, the " 'touching' "

element of a violation of section 288 "includ[es] a *constructive touching* by the victim at the defendant's direction." (*Lopez*, at p. 1233, italics added.)

Thus, "section 288 is violated by 'any touching' of an underage child, including a constructive touching by the victim at the defendant's direction, 'accomplished with the intent of arousing the sexual desires of either the perpetrator or the child.' " (*Lopez*, *supra*, 185 Cal.App.4th at p. 1233, quoting *Martinez*, *supra*, 11 Cal.4th at p. 452 & citing *Austin*, *supra*, 111 Cal.App.3d 110.)

The *Lopez* case is instructive. In *Lopez* a jury convicted the defendant of (among other offenses) two counts of committing a lewd act upon a child under the age of 14 in violation of section 288(a) based on evidence establishing that he photographed his two stepdaughters after directing them to change into their mother's lingerie and play a game in which they searched for money while blindfolded. (*Lopez*, *supra*, 185 Cal.App.4th at pp. 1224-1225, 1227, 1228.) On appeal the defendant argued the evidence was insufficient to sustain those convictions because he did not touch the girls, he was not present when they changed their clothes, and there was no evidence he harbored any lewd intent when the girls touched themselves while changing their clothes. (*Id.* at p. 1230.) Acknowledging he may have experienced sexual gratification when he observed the girls as they searched for the money while blindfolded and wearing lingerie, he argued there was no evidence he experienced sexual gratification while the girls were changing their clothes, and thus concurrence of act and intent was lacking. (*Ibid.*)

Rejecting the defendant's arguments and affirming his convictions under section 288(a), the *Lopez* court concluded there was "overwhelming evidence that defendant was

sexually exploiting [the children] when he directed them to dress in provocative clothing and then play the money game." (*Lopez, supra*, 185 Cal.App.4th at pp. 1232, 1224.) The court explained:

"Because of the apparent legislative intent to apply section 288 expansively to any sexually motivated touching, including touchings by the victim at the defendant's direction, we conclude section 288 encompasses defendant's act in the instant case of directing the victims to change into provocative clothing for the sexually motivated purpose of watching the girls search for money in the provocative clothing. *The defendant committed the touching acts constructively, through the victims as conduits for the purpose of sexual arousal. Even though defendant may not have experienced sexual arousal at the moment the victims touched themselves when putting on the provocative clothing, defendant's intent when instigating or causing the touchings was lewd and lascivious within the meaning of section 288, since the touchings were sexually motivated and committed for the purpose of defendant's sexual gratification.*" (*Id.* at p. 1233, italics added.)

Similarly here, overwhelming evidence establishes that Kinloch sexually exploited John Doe 2 and John Doe 5 when, by using an internet social networking site and virtually masquerading as a sexually precocious teenage girl, he persuaded them to take off their clothes and send him nude and sexually explicit photographs of themselves. The boys' acts of touching themselves to remove their clothing and John Doe 2's act of masturbating were sexually motivated constructive touchings by these victims at Kinloch's direction that were lewd or lascivious within the meaning of section 288 because they were accomplished by Kinloch "with the intent of arousing the sexual desires of either the perpetrator or the child[ren]." (See *Martinez, supra*, 11 Cal.4th at p. 452; *Lopez, supra*, 185 Cal.App.4th at p. 1233; *Austin, supra*, 111 Cal.App.3d at pp. 114-115.) Even though Kinloch may not have experienced what he refers to as

" 'immediate' or contemporaneous sexual arousal" when he requested the photos or when John Doe 2 and John Doe 5 touched and photographed themselves, his "intent when instigating or causing the touchings was lewd and lascivious within the meaning of section 288, since the touchings were sexually motivated and committed for the purpose of [his] sexual gratification" (*Lopez*, at p. 1233).

*B. Instructional Error Claim*

Kinloch also contends the court "prejudicially erred by refusing to instruct the jurors [that] the section 288 offenses required proof that [he] was present when the touching occurred or that the touching was simultaneous with the arousal sought."<sup>8</sup> In support of this contention, Kinloch states he is "repeat[ing] his claim that when charging a defendant with lewd conduct with a minor based on online communications, the state must prove a contemporaneous nexus between the defendant's request that the minor touch himself and the actual touching, and a similar nexus between the touching and the defendant's arousal." He also asserts "[t]he facts squarely supported [his] theory of the case as it related to section 288, subd[ivisions] (a) and (c) involving John Doe 2 and 5, and the trial court erred by refusing the requested instruction."

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<sup>8</sup> Kinloch's trial counsel asked the court to modify CALCRIM No. 1110, the standard instruction on section 288(a), by giving the following instruction to the jury: "The defendant's intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child must occur contemporaneously with the child[s] touching himself. In other words, the defendant's wrongful intent must occur at the same time as the act of the touching." The court denied that request, citing *Martinez, supra*, 11 Cal.4th 434, *Lopez, supra*, 185 Cal.App.4th 1220, and *Austin, supra*, 111 Cal.App.3d 110.

Kinloch's claim of instructional error is unavailing because, for reasons discussed, *ante*, we have rejected the claim he repeats here that "the state must prove a contemporaneous nexus between the defendant's request that the minor touch himself and the actual touching, and a similar nexus between the touching and the defendant's arousal." Furthermore, "the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law." (*People v. Gurule* (2002) 28 Cal.4th 557, 659.) We conclude the trial court properly refused to give Kinloch's proffered instruction because it was an incorrect statement of law. (*Ibid.*; see *Martinez, supra*, 11 Cal.4th 434, *Lopez, supra*, 185 Cal.App.4th 1220 & *Austin, supra*, 111 Cal.App.3d 110, discussed, *ante*.)

## II. CHARGING ERROR CLAIM

Relying on the *Williamson*<sup>9</sup> rule, Kinloch next contends "[his] conduct involving John Doe 2 and [John Doe] 5 should have been charged under the specific statutes involving child pornography possession [(§ 311.11)<sup>10</sup>] and distributing harmful matter

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<sup>9</sup> "Defendant's challenge is premised on a doctrine often referred to as the *Williamson* rule, based on . . . *In re Williamson* (1954) 43 Cal.2d 651, 654." (*People v. Murphy* (2011) 52 Cal.4th 81, 86 (*Murphy*).)

<sup>10</sup> Section 311.11 subdivision (a) provides: "Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image that contains or incorporates in any manner, any film or filmstrip, the production of which involves the use of a person under 18 years of age, knowing that the matter depicts a person under 18 years of age personally engaging in or simulating sexual conduct, as defined in subdivision (d) of Section 311.4, is guilty of a felony and shall be

electronically [ (§ 288.2)<sup>11</sup>] rather than under the more general lewd act provision[s of section 288]." Asserting "the evidence does not establish" a violation of section 288, he contends that, by prosecuting the counts involving John Doe 2 and John Doe 5 under that section, "the prosecutor ignored the principle that a specific statute takes preceden[ce] over a general one." We reject these contentions.

#### A. *Williamson Rule*

The California Supreme Court has explained that, "[u]nder the *Williamson* rule, if a general statute includes the *same conduct* as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute." (*Murphy, supra*, 52 Cal.4th at p. 86, citing *In re Williamson, supra*, 43 Cal.2d at p. 654, italics added.) *Murphy* further explains that, "[a]bsent some indication of legislative intent to the

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punished by imprisonment in the state prison, or a county jail for up to one year, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both the fine and imprisonment."

<sup>11</sup> Section 288.2, subdivision (a)(1), provides: "Every person who knows, should have known, or believes that another person is a minor, and who knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including by physical delivery, telephone, electronic communication, or in person, any harmful matter that depicts a minor or minors engaging in sexual conduct, to the other person with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of the minor, and with the intent or for the purposes of engaging in sexual intercourse, sodomy, or oral copulation with the other person, or with the intent that either person touch an intimate body part of the other, is guilty of a misdemeanor, punishable by imprisonment in a county jail not exceeding one year, or is guilty of a felony, punishable by imprisonment in the state prison for two, three, or five years."

contrary, the *Williamson* rule applies when (1) 'each element of the general statute corresponds to an element on the face of the special statute' or (2) when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.' " (*Murphy*, at p. 86, quoting *People v. Watson* (1981) 30 Cal.3d 290, 295-296.) "In its clearest application," the *Murphy* court stated, "the [*Williamson*] rule is triggered when a violation of a provision of the special statute would inevitably constitute a violation of the general statute." (*Murphy*, at p. 86.)

#### B. *Analysis*

We conclude the *Williamson* rule is not applicable and, thus, Kinloch's contention that "his conduct involving John Doe 2 and [John Doe] 5" should have been charged under sections 288.2 and 311.11 (which he refers to as "specific" statutes) rather than under section 288 (which he refers to as a "more general" statute) must be rejected. As noted, the *Williamson* rule applies when either of the following two elements (*Williamson/Murphy* elements) is met: (1) each element of a general statute corresponds to an element on the face of a special statute; or (2) it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute. (*Murphy, supra*, 52 Cal.4th at p. 86.)

Here, neither of these two elements governing application of the *Williamson* rule is met. The first *Williamson/Murphy* element is not met because each element of the purported general statute, section 288, does *not* correspond to an element on the face of either of the two purported special statutes, sections 288.2 and 311.11. A conviction under section 288 requires proof that (among other things) the defendant "willfully and

lewdly commit[ted] any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years." (§ 288(a); see fn. 6, *ante.*)

This element of a violation of section 288 does not correspond to an element found on the face of either section 288.2 or section 311.11. (See fns. 10 & 11, *ante.*)

The second *Williamson/Murphy* element is also not met because the statutory context does not show that a violation of the purported special statutes, sections 288.2 and 311.11, would necessarily or commonly result in a violation of the purported general statute, section 288. This is so because, unlike sections 288.2 and 311.11, section 288 requires proof that the defendant "willfully and lewdly commit[ted] any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years." (§ 288, subd. (a); see fns. 6 & 10-11, *ante.*) Thus, a violation of either section 288.2 or section 311.11 would not necessarily or commonly result in a violation of section 288.

### III. *DENIAL OF KINLOCH'S MOTION FOR A MISTRIAL*

Kinloch also contends the court prejudicially abused its discretion when it denied his motion for a mistrial after one of the complaining witnesses, John Doe 3, improperly testified that Kinloch once told him he had been caught in a "porn ring." We reject this contention.

#### A. *Background*

Before trial, the prosecutor asked the court for permission to present evidence that Kinloch had told John Doe 3 he had travel plans to go to England to testify about a child

pornography ring he had been involved in back in the 1990's. Defense counsel opposed this request. The court denied the prosecutor's request and excluded the evidence.

In his opening statement, defense counsel told the jury, "We are conceding that Mr. Kinloch possessed child pornography."

At trial, John Doe 3 testified about the sexual relationship he had had with Kinloch when he was 14 years of age. The prosecutor asked John Doe 3 why the relationship ended in 1998. John Doe 3 responded, "A lot of things. I was not happy in the relationship. I had doubts about myself and him and his sexuality. [¶] *He had told me he had been caught in a porn ring[.]*" (Italics added.)

Defense counsel immediately objected. The court sustained the objection and struck John Doe 3's testimony. Noting it was 4:30 p.m., the court then released the jury for the evening.

Outside the presence of the jury, the court told the prosecutor, "I'll just remind you to admonish this witness not to go there with regard to anything pertaining to a child porno[graphy] ring." The prosecutor agreed to do so. Kinloch's counsel then moved for a mistrial, arguing that John Doe 3's statement to the jury was so prejudicial that it affected Kinloch's due process right to a fair trial. The prosecutor opposed the motion, arguing that John Doe 3 had not stated that Kinloch had been involved in a "child pornography" ring. Defense counsel responded that a "porn ring" by definition involved children because adult pornography was legal. The prosecutor later argued that the jury already had heard evidence that thousands of images of child pornography had been found on Kinloch's home computer.

Following additional arguments by both counsel, the court denied Kinloch's mistrial motion and indicated it would give the jury an admonishment to completely disregard John Doe 3's statement. The court noted that defense counsel had conceded during his opening statement to the jury that Kinloch was not contesting that he had possessed child pornography. The court also noted that the jury had heard evidence that hundreds of images of child pornography had been found on Kinloch's computers.

Before John Doe 3's testimony resumed, the court admonished the jury as follows:

"We ended at 4:30. I tried to keep everybody on time. But at the very end of the hearing, there was an objection which I sustained. I am striking the answer. But that reminded me to just remind you all of some of the rules that I read early on with regard to objections, and we talked a little bit about that at the very beginning of the trial, now a couple days ago. [¶] So I did want to remind you regarding the earlier instruction by me regarding sustaining objections and striking answers. So to recall, when I sustain an objection, the witness is generally not permitted to answer the question. You must not guess why I sustained the objection. You may not speculate as to what the answer might have been. [¶] Now, if an answer is given to a question and the Court grants a motion to strike out the answer, then *you are to completely disregard the answer and must not consider it for any purpose. You must treat it as though you never heard it.* [¶] So I just wanted to remind you of that rule because I think you heard a couple of objections throughout the trial and I've sustained and struck answers and, you know, but then we kind of go on to the next question. Just it's important, though, and I want to reiterate the importance of that rule and again admonish you to follow those rules." (Italics added.)

#### B. *Applicable Legal Principles*

"We review the denial of a motion for mistrial under the deferential abuse of discretion standard." (*People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A mistrial should be granted if the trial court is apprised of prejudice it judges to be incurable by admonition or instruction. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.) However, "[w]hether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*Id.* at p. 986.)

"Ordinarily, a curative instruction to disregard improper testimony is sufficient to protect a defendant from the injury of such testimony, and, ordinarily, we presume a jury is capable of following such an instruction." (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834 (*Navarrete*); see *People v. Allen* (1978) 77 Cal.App.3d 924, 934 (*Allen*) [juries are "presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith"].) It is "only in the exceptional case" that a trial court's admonition to the jury to disregard improper evidence will not cure the prejudicial effect, if any, of such evidence. (*Allen*, at p. 935.)

We review the legal correctness of the court's ruling, not the court's reasoning. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

### C. *Analysis*

We conclude the court did not abuse its broad discretion when it denied Kinloch's motion for a mistrial. As noted, defense counsel immediately moved for a mistrial after John Doe 3, in response to the prosecutor's question about why his relationship with Kinloch ended in 1998, testified that Kinloch told him he (Kinloch) "had been caught in a porn ring." (*Italics added.*) The court admonished the jurors to "completely disregard the answer," "not consider it for any purpose," and "treat it as though you never heard of it."

We presume the jury followed the court's admonition and disregarded John Doe 3's improper statement. (See *Navarrete, supra*, 181 Cal.App.4th at p. 834; *Allen, supra*, 77 Cal.App.3d at p. 934.) John Doe 3's statement was very brief and, assuming the jury understood the reference to "porn" to mean child pornography, any prejudicial effect was minimal because, as the court correctly noted, defense counsel had conceded during his opening statement to the jury that Kinloch was not contesting that he had possessed child pornography.

Our conclusion is supported by the fact that the jury found Kinloch not guilty of the lewd act offenses charged in count 25 (§ 288(a)), which involved John Doe 2, and in counts 33 and 34 (§ 288(c)(1)), which involved John Doe 4. These not-guilty verdicts indicate the jury heeded the court's curative admonition and focused on the evidence presented. We conclude this case is not one of the "exceptional case[s]" in which an admonition to the jury to disregard improper evidence could not cure the prejudicial effect of the witness's improper statement. (See *Allen, supra*, 77 Cal.App.3d at p. 935.)

#### IV. PROPENSITY EVIDENCE (EVID. CODE, § 1108)

Kinloch also claims the court prejudicially erred by allowing, under Evidence Code section 1108, Agent Thompson, a crime investigator with the Department of Homeland Security, "to describe hundreds of pornographic images he found on [Kinloch]'s computer while searching his house." We reject this claim.

##### A. Background

Citing Evidence Code sections 1108 and 352, the People filed a motion in limine asking the court to allow, as uncharged-crime propensity evidence, the admission of

Agent Thompson's expert testimony that Kinloch had amassed an enormous collection of pornographic images of underage boys on his computer devices. The prosecutor did not ask the court to admit the images themselves.

Defense counsel opposed the motion, arguing Agent Thompson's testimony should be excluded because Kinloch's rights under the confrontation clause would be violated if the prosecution failed to produce all of the children depicted in the images of child pornography, the images constituted inadmissible hearsay and lacked foundation as to the ages of boys shown in the photographs, and admission of the evidence would create a substantial danger of undue prejudice. He asserted the prosecution was required to "bring in each boy" regarding "the photograph[s the prosecution] wants to show and let [the defense] cross-examine that person."

The court agreed to conduct an evidentiary hearing under Evidence Code section 402. At that hearing Agent Thompson testified about his training and experience in identifying the ages of children depicted in child pornography.

Following the hearing and arguments by both counsel, the court found that a foundation had been provided for Agent Thompson's opinion that many images found on Kinloch's computer devices constituted child pornography. The court ruled that Agent Thompson's proffered testimony was "relevant and admissible pursuant to Evidence Code [s]ection 1108," and that the court would permit the prosecution to present that testimony to the jury.

In his trial testimony, Agent Thompson stated that he found "hundreds of child pornographic images of pre- and postpubescent young males and numerous child

pornography videos depicting similar[ly-]aged . . . individuals" on Kinloch's electronic devices.

### B. *Applicable Legal Principles*

As a general rule, evidence of a person's character is inadmissible to prove conduct on a specific occasion. (Evid. Code, § 1101, subd. (a); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Thus, evidence of other crimes or bad acts is generally inadmissible when it is offered to show a defendant had the criminal disposition or propensity to commit the crime charged. (Evid. Code, § 1101, subd. (a); *Ewoldt*, at p. 393.)

However, an exception to this rule is set forth in Evidence Code section 1108, which provides in subdivision (a) that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352." (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1115-1116.) In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court explained the legislative purpose of Evidence Code section 1108:

"[T]he Legislature enacted [Evidence Code] section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases. . . . [¶] Available legislative history indicates [Evidence Code] section 1108 was intended in sex offense cases to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta*, at p. 911.)

In a criminal action in which the defendant is accused of one of a list of sexual offenses, Evidence Code section 1108 allows admission of evidence of the defendant's commission of another listed sexual offense that otherwise would be made inadmissible by Evidence Code section 1101, subdivision (a). (See Evid. Code, § 1108, subds. (a) & (d)(1).) Furthermore, the uncharged and charged offenses are considered sufficiently similar if they are both sexual offenses enumerated in Evidence Code section 1108. (*People v. Frazier* (2001) 89 Cal.App.4th 30, 41.)

As the Supreme Court explained in *Falsetta*, *supra*, 21 Cal.4th 903, in determining whether to admit Evidence Code section 1108 propensity evidence of a defendant's prior sexual offense, trial courts "must engage in a careful weighing process under [Evidence Code] section 352" by "consider[ing] such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, at p. 917.) The *Falsetta* court held that Evidence Code section 1108 does not violate due process principles, and, thus, is constitutionally valid, because it subjects evidence of uncharged sexual misconduct to the weighing process of Evidence Code section 352 in sex crime prosecutions. (*Falsetta*, at pp. 907, 917-918, 922.)

Under Evidence Code section 352, evidence is properly excluded if its probative value is "substantially outweighed" by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Ibid.*; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

### C. *Analysis*

Kinloch raises four contentions, all unavailing, in support of his claim that the court prejudicially erred by allowing the prosecution to present Agent Thompson's expert testimony "describ[ing] hundreds of pornographic images" he found on Kinloch's electronic devices.

#### 1. *Foundation*

First, citing *People v. Bowley* (1963) 59 Cal.2d 855, 862 (*Bowley*), Kinloch contends Agent Thompson's testimony describing the images was inadmissible because the images "lacked a proper foundation." In support of this contention, he asserts (1) "no photograph has any value absent a proper foundation," (2) "[t]he law requires testimony from a person who was present at the time the photograph was taken [because it is necessary to know] that it accurately depicts what it purports to show," and (3) Agent Thompson "had no such knowledge." He complains that Agent Thompson "based his . . . testimony upon . . . his 'expertise' in determining what constitutes child pornography, the age of the subjects depicted, etc."

However, the *Bowley* case is of no assistance to Kinloch. In *Bowley*, a jury found defendant guilty of oral copulation (former § 288a). (*Bowley, supra*, 59 Cal.2d at p. 856.)

The prosecution's only witness was a female accomplice who testified that defendant's brother employed her to play a part in a motion picture, and during the filming she orally copulated the defendant. (*Ibid.*) The prosecution produced a film purporting to show these activities, and the accomplice testified that she had seen portions of the film, and that those portions accurately represented what took place during the making of the film. (*Id.* at p. 857.) Over a defense objection, the court admitted the film into evidence and it was shown to the jury. (*Ibid.*) The accomplice testified the defendant was the male in the film whose face was covered with grease and whose hair was covered with a turban. (*Ibid.*) On appeal, the California Supreme Court reversed the judgment, reasoning that the female accomplice's foundation testimony regarding the accuracy of the pornographic film was required to be corroborated under section 1111 by evidence other than her own testimony, but the only evidence offered to corroborate her testimony was the film. (*Bowley*, at pp. 857, 863.)

As pertinent here, the Supreme Court stated in *Bowley* that "[n]o photograph or film has any value in the absence of a proper foundation. It is necessary to know when it was taken and that it is accurate and truly represents what it purports to show." (*Bowley*, *supra*, 59 Cal.2d at p. 862.) The *Bowley* court then explained that "[t]his foundation is usually provided by the testimony of a person who was present at the time the picture was taken, or who is otherwise qualified to state that the representation is accurate. In addition, *[the foundation] may be provided by the aid of expert testimony . . . although there is no one qualified to authenticate it from personal observation.*" (*Ibid.*, italics added.) Thus, *Bowley* stands for the proposition that the foundation for a photograph

may be provided by the testimony of an expert witness when "there is no one qualified to authenticate it from personal observation." (*Ibid.*)

Applying *Bowley*, we reject Kinloch's contention that Agent Thompson's testimony describing the hundreds of pornographic images he found on Kinloch's electronic devices was inadmissible because the images lacked a proper foundation. As Kinloch acknowledges, Agent Thompson "based his . . . testimony upon . . . his 'expertise' in determining what constitutes child pornography [and] the age[s] of the subjects depicted." Under *Bowley*, the foundation "may be provided by the aid of expert testimony," like the expert testimony provided in this case by Agent Thompson. (See *Bowley, supra*, 59 Cal.2d at p. 862.)

## *2. Hearsay and right to confrontation*

Kinloch next contends Agent Thompson's testimony describing the images and the boys depicted therein was inadmissible because he was "deprived of learning the identities of the minors," his testimony was "replete" with inadmissible hearsay, and there was no recognized exception allowing the state to deprive him of his constitutional right to confrontation. Kinloch's contention is unavailing.

### *a. Applicable legal principles*

Evidence is defined as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140.) Hearsay is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).)

"The confrontation clause of the Sixth Amendment to the federal Constitution, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The right of confrontation includes the right of cross-examination." (*People v. Fletcher* (1996) 13 Cal.4th 451, 455.) In *Crawford v. Washington* (2004) 541 U.S. 36, 53-54 (*Crawford*), the United States Supreme Court held that the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

*"Photographs and videotapes are demonstrative evidence, depicting what the camera sees. [Citations.] They are not testimonial and they are not hearsay, that is, 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.'" (People v. Cooper* (2007) 148 Cal.App.4th 731, 746 (*Cooper*), quoting Evid. Code, § 1200, italics added.)

b. *Analysis*

We reiterate that Kinloch is challenging Agent Thompson's expert testimony "describ[ing] hundreds of pornographic images" he found on Kinloch's electronic devices, and those images were not admitted in evidence. As already discussed, *ante*, Agent Thompson testified that he found "hundreds of child pornographic images of pre- and postpubescent young males and numerous child pornography videos depicting similar[ly]-aged . . . individuals" on Kinloch's electronic devices. Kinloch's hearsay and confrontation clause challenges to Agent Thompson's testimony are unavailing. Agent

Thompson's expert opinion testimony that the images depicted underage boys and constituted child pornography was based on his own observations and his vast expertise with child pornography (which Kinloch does not challenge). His challenged testimony was not hearsay because it was not "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" (Evid. Code, § 1200, subd. (a)), and it did not contain testimonial statements of a witness who did not appear at trial for purposes of Kinloch's right under the confrontation clause. (See *Crawford, supra*, 541 U.S. at pp. 53-54.) The images on which Agent Thompson based his testimony were demonstrative evidence that "depict[ed] what the camera[s saw]"; they were not testimonial and they were not hearsay. (See *Cooper, supra*, 148 Cal.App.4th at p. 746.)

### 3. Evidence Code section 1108

Last, Kinloch contends Agent Thompson's testimony describing the images and the boys depicted therein was inadmissible under Evidence Code section 1108 because the court "failed to conduct the Evidence Code section 352 balancing test required by [Evidence Code] section 1108." He further asserts "there was no showing in the record that the court ever weighed the probative value of the evidence against the prejudicial impact it would have on the jury." Kinloch's claim of evidentiary error is unavailing.

Citing *People v. Waidla* (2000) 22 Cal.4th 690, Kinloch acknowledges that "[e]xpress evidence that the court did so is not required, just evidence that the court was aware of its duty to engage in the required balancing test, and that it did so."

Indeed, the California Supreme Court explained in *Waidla* that a trial court, in making a determination whether certain evidence is substantially more prejudicial than probative within the meaning of Evidence Code section 352, " 'need not expressly weigh prejudice against probative value—or even expressly state that [it] has done so.' " (*Waidla*, at p. 724, fn. 6, quoting & approving *People v. Mickey* (1991) 54 Cal.3d 612, 656.) The record need only show affirmatively that the trial court did so. (*Mickey*, at p. 656.)

Here, the record affirmatively shows the court was aware of its statutory duty to engage in the required balancing test under Evidence Code section 352, and that it did so, as required by Evidence Code section 1108 (*Falsetta, supra*, 21 Cal.4th at pp. 917-918). The People's motion in limine No. 1, which asked the court to allow the admission of Agent Thompson's testimony pursuant to Evidence Code section 1108, specifically argued that "[Evidence Code s]ection 1108 is presumptively admissible, unless it is deemed unduly prejudicial as defined in Evidence Code section 352," and then quoted Evidence Code section 352 in its entirety. At the hearing on the motion, the court acknowledged it had read the motion, and then it asked defense counsel to respond. Defense counsel stated the evidence was "more prejudicial than probative." Implicitly rejecting defense counsel's argument that Agent Thompson's proffered testimony was "more prejudicial than probative" for purposes of Evidence Code section 352 and 1108, the court granted the People's in limine motion, finding that the testimony was "admissible pursuant to Evidence Code [s]ection 1108." The foregoing record is sufficient.

## V. CRUEL AND UNUSUAL PUNISHMENT

Last, Kinloch contends his prison term of five years plus 120 years to life "constitutes cruel and/or unusual punishment that is prohibited by the California and United States Constitutions." We reject this contention.

### A. Applicable Legal Principles

The test to be applied in California for determining whether a particular punishment violates the California constitutional prohibition against cruel or unusual punishment (Cal. Const., art. I, § 17) is whether, " 'although not cruel or unusual in its method, it is so disproportionate to the crime[s] for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Dillon* (1983) 34 Cal.3d 441, 478, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) It is permissible to base the determination of whether the punishment constitutes cruel and unusual punishment solely on the nature of the current offenses and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on another point in *People v. Deloza* (1998) 18 Cal.4th 585, 593, 600, fn. 10; *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311.)

The California Supreme Court has emphasized that a defendant must overcome a "considerable burden" in challenging a penalty on the ground it constitutes cruel or unusual punishment under the California Constitution. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) Our high state court has stated that "[t]he doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature. Perhaps

foremost among these are the definition of crime and the determination of punishment." (*Ibid.*)

A sentence violates the federal Constitution (U.S. Const., 8th & 14th Amendments.) if it is "grossly disproportionate" to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 23-24 (*Ewing*); *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1076.)

#### B. *Analysis*

After considering the nature of both the offender, Kinloch, and the crimes he committed in this case, we conclude his sentence of five years plus 120 years to life in prison (1) does not violate the California Constitution's prohibition of cruel or unusual punishment because it is not "so disproportionate to the crime[s] for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity" (*Lynch, supra*, 8 Cal.3d at p. 424), and (2) it does not violate the federal Constitution's prohibition of cruel or unusual punishment because it is not "grossly disproportionate" to the severity of the crimes (*Ewing, supra*, 538 U.S. at p. 23). The jury found Kinloch guilty of 33 counts of lewd and lascivious conduct in violation of section 288. He committed these crimes against four underage victims (John Does 1, 2, 3, and 5). Kinloch was John Doe 1's second grade teacher when he began molesting John Doe 1, who was then seven years old, inside the classroom after school. As detailed more fully in the factual background, *ante*, Kinloch deceitfully snared some of his victims through the use of online social media by masquerading as a sexually-precocious teenage girl. Kinloch's life sentence does not violate the constitutional prohibitions of cruel or unusual punishment.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.